No. 91-164

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

THOMPSON/CENTER ARMS COMPANY, A DIVISION OF THE K.W. THOMPSON TOOL COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Much of respondent's factual discussion relates to its claim that the Thompson pistol and conversion kit will generally be used to produce "good" guns instead of "bad" guns. See Br. in Opp. 2, 4, 5, 6-7, 15. As we explain in the petition (Pet. 14), however, the question whether a particular weapon is used more often for "criminal" than for "sporting" purposes is not relevant under the National Firearms Act. A rifle is regulated under the Act if it has a short barrel. No more is required for the statute to apply. 26 U.S.C. 5845(a)(3).

Moreover, while respondent asserts that the "sportsmen who would use this product are *generally* law abiding" (Br. in Opp. 2) (emphasis added), respondent ultimately acknowledges that the short-barrel rifle resulting from use of its conversion kit "would have no sporting

utility" (*ibid.*).[1] Undeterred by this admission, respondent nonetheless suggests that its Contender system should not be subject to regulation because "a short-barrel rifle is less likely to be used in a crime than any other type of firearm" (Br. in Opp. 6-7). Respondent thus apparently believes that Congress should not have bothered to regulate short-barrel rifles. It is beyond question, however, that Congress chose to do so. See 26 U.S.C. 5845(a)(3).

Short-barrel rifles and shotguns are regulated because of their obvious potential for concealment. See 26 U.S.C. 5845(a)(2) and (3). Congress did not attempt to draw the ephemeral line that respondent proposes between "sporting" and "criminal" weapons.[2] Instead, Congress chose categorically to regulate certain types of weapons that it deemed generally reprehensible. Short-barrel rifles and shotguns are at the very top of the list of weapons that Congress chose to regulate. See 26 U.S.C. 5845(a).

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[1] Respondent claims that the "'design' of the manufacturer and the 'intent' of the user is to make a pistol with a 10" [inch] barrel or a rifle with a 21" [inch] barrel" (Br. in Opp. 5). Respondent cites no evidentiary support for this assertion, and there is none. Moreover, it is clear that the Thompson parts are also "designed" and "intended" by the manufacturer to be interchangeable in a way that produces a short-barrel rifle. Indeed, interchangeability is at the heart of the Contender's commercial concept. In fact, a short-barrel rifle can be assembled from the Contender conversion kit even more quickly and easily than a long-barrel rifle. See Pet. 3 & n.2.

[2] Respondent suggests that its Contender system is not as powerful as an Uzi and implies that it should therefore be judged by a different standard (Br. in Opp. 6). Respondent acknowledges (*id.* at 6-7 n.4), however, that Uzi makes a carbine as well as a machinegun. If Uzi were to manufacture a "conversion kit" to alter its carbine to a short-barrel rifle, it would be subject to the same regulatory framework as a "conversion kit" made by Thompson or any other manufacturer. Regulation under the National Firearms Act does not distinguish among rifles based upon their caliber or magazine size. The same standards apply to all rifles: they are regulated if they have short barrels. 26 U.S.C. 5845(a)(3).

Thompson's disagreement with this legislative determination is not a valid basis for evasion of the statute's plain commands.

Although respondent attempts to portray its pistol and conversion kit in glowing terms as a sportsman's gun (Br. in Opp. 3), neither the statute nor the case law supports any distinction between "good" and "bad" short-barrel rifles. It would have been simple enough for Thompson to design its pistol and rifle parts in a way that would prevent their interchangeability. Thompson's commercial interest in promoting the interchangeable features of its weapon system, however, is unquestionably not a proper basis for ignoring the statute. Nor is it a basis for ignoring the Treasury rulings that have long provided that a pistol possessed with an "attachable" shoulder stock is regulated as a short-barrel rifle under the National Firearms Act. Rev. Rul. 61-45, 1961-1 C.B. 663; Rev. Rul. 61-203, 1961-2 C.B. 224.

2. Respondent mistakenly asserts (Br. in Opp. 3, 13-18) that the Bureau of Alcohol, Tobacco and Firearms (BATF) has been inconsistent in its application of the statute to the Contender system. Respondent claims to be puzzled by the fact that BATF has approved the *separate* marketing of a complete Contender pistol or a complete Contender rifle but has determined that the *joint* marketing of the pistol with the conversion kit is subject to regulation. See Br. in Opp. 3-4.

There is no puzzle in these rulings. The BATF analysis has not been inconsistent. A Contender pistol, when sold *by itself* without a rifle stock, is not a short-barrel rifle. A Contender rifle, when sold *by itself* without a short barrel, is not a short-barrel rifle. But a Contender pistol, when sold or held with a conversion kit that permits the pistol to be assembled as a short-barrel rifle in less than five minutes (see Pet. 3 n.3), *is* subject to regulation because it contains all the components of a short-barrel rifle in user-ready form. See *United States* v. *Drasen*, 845 F.2d 731, 736-737 (7th Cir.), cert. denied, 488 U.S. 909 (1988). See also *United States* v. *Endicott*,

803 F.2d 506, 508 (9th Cir. 1986); *United States* v. *Luce*, 726 F.2d 47, 48-49 (1st Cir. 1984); *United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977), cert. denied, 435 U.S. 906 (1978). The agency's rulings have consistently drawn and applied this very distinction for more than 30 years. See Rev. Rul. 61-45, *supra*; Rev. Rul. 61-203, *supra*.

3. Respondent claims (Br. in Opp. 8-10) that, when Congress amended the National Firearms Act in 1968, it rejected the prior decisions and rulings that established that a complete parts kit from which a regulated weapon may be assembled is itself regulated under the Act (see *United States* v. *Kokin*, 365 F.2d 595, 596 (3d Cir.), cert. denied, 385 U.S. 987 (1966); Rev. Rul. 54-606, 1954-2 C.B. 33). Respondent draws this conclusion from the fact that in the Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1231, the definition of "machinegun" in Section 5845(b) of the National Firearms Act was amended to "include" (i) the "frame or receiver of any such weapon," (ii) any "combination of parts" designed for "converting a weapon into a machinegun," and (iii) any "combination of parts from which a machinegun can be assembled" (26 U.S.C. 5845(b)). Respondent claims (Br. in Opp. 8-13) that, by specifically "includ[ing]" a "combination of parts" from which a machinegun can be assembled within the statutory definition of "machinegun" in 1968, Congress necessarily intended to *exclude* a "combination of parts" from which a short-barrel rifle can be assembled from the statutory definition of regulated "rifles" under the Act.

This argument is based on a serious misreading of history. The Gun Control Act of 1968 was enacted soon after the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. The Act represented a strong and swift political reaction to those events. The objective of the 1968 legislation was quite clearly to broaden, rather than narrow, the provisions of the National Firearms Act. The legislative findings in support of the Gun Control Act of 1968 recited:

> Handguns, rifles and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today. * * * No civilized society can ignore the malignancy which this senseless slaughter reflects.

H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968). Congress noted its specific concern over the role played by rifles and shotguns in this "senseless slaughter" (*id.* at 8):

> Of the 6,500 firearms murders in the United States each year, 30 percent, or over 2,000, are committed with rifles or shotguns. * * * President Kennedy, Martin Luther King, Jr., Medgar Evers, and the 16 dead and 31 wounded victims of a deranged man firing from the tower of the University of Texas were all shot by rifles or shotguns.

It was against this background that Congress enacted the Gun Control Act of 1968 to "aid in curbing the problem of gun abuse that exists in the United States." S. Rep. No. 1501, 90th Cong., 2d Sess. 23 (1968). Congress succinctly described the revisions it enacted to the National Firearms Act in 1968 as "strengthening and clarifying amendments." *Id.* at 26.

One of the "strengthening and clarifying amendments" enacted in 1968 was the expansive definition of "machinegun" added in Section 5845(b) of the Act. This amendment codified the rationale of the decision in *United States* v. *Kokin*, 365 F.2d at 596, which held that a complete parts kit that could be used to make a machinegun was subject to regulation under the National Firearms Act (*ibid.*). The amendment also went much further, however, and specified that a single part such as a "receiver" or "frame" of a machinegun, or any parts designed for converting a weapon into a machinegun, is subject to regulation under the Act. See 26 U.S.C. 5845 (b); S. Rep. No. 1501, *supra*, at 45-46.

It distorts history as well as logic for respondent to suggest (Br. in Opp. 8-10) that by enlarging the scope

of regulation for machineguns in 1968 to "include" certain individual gun parts *as well as* conversion kits *and* complete parts kits used to make a "machinegun," Congress meant to narrow the definition of other sections of the Act to *exclude* from regulation an unassembled but complete parts kit that can be used to make a short-barrel "rifle." As all of the courts of appeals that had considered this question concluded prior to the decision in this case, the 1968 amendments to the National Firearms Act did not intend to alter the "common sense" result that a complete parts kit that can be assembled in the form of a regulated weapon is subject to the Act. See *United States* v. *Drasen*, 845 F.2d at 737; *United States* v. *Luce*, 726 F.2d at 49 ("Congress clearly intended this common sense interpretation."); *United States* v. *Woods*, 560 F.2d at 665 (the statute "does not specify that the parts must be assembled before it applies"). See also Pet. App. 31a. As the court of appeals stated in *United States* v. *Woods*, "to reason otherwise would be to frustrate or defeat the very purpose of the statute." 560 F.2d at 665.

This conclusion is quite obviously supported by history as well as by common sense. No one who lived through the events of that year could seriously contend that the Gun Control Act of 1968 was enacted "to frustrate or defeat" the regulation of short-barrel rifles and shotguns or in any other manner to *narrow* the preexisting, judicial or administrative construction of the National Firearms Act.[3] Cf. *Chisom* v. *Roemer*, 111 S. Ct. 2354, 2368

[3] Indeed, one of the specific objectives of the 1968 amendments to the National Firearms Act was to alter the result in *Haynes* v. *United States*, 390 U.S. 85 (1968), which held that, under the Act as it then existed, the privilege against compelled self-incrimination would provide "a full defense to prosecutions either for failure to register a firearm * * * or for possession of an unregistered firearm" (*id.* at 100). Congress amended Section 5848 of the National Firearms Act to avoid this result by prohibiting the use of registration information against the person filing it "as evidence * * * in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing" of that information. 26 U.S.C. 5848(a). See S. Rep. No. 1501, *supra*, at 26.

(1991) ("It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection.").

4. The Treasury has also consistently ruled that a complete parts kit for use in assembling a regulated weapon is subject to the Act. This "common sense" conclusion was expressed in Rev. Rul. 54-606, 1954-2 C.B. 33, which stated:

> Where an individual, partnership, company, association, or corporation has possession or control of sufficient parts to assemble an operative firearm as defined in section 5848(1) of the Internal Revenue Code of 1954, the possession or control thereof constitutes a "firearm."[4]

In 1972, this Ruling—along with more than 100 other rulings issued under the Internal Revenue Code chapters dealing with alcohol, tobacco and firearms regulation—was "declared to be obsolete." Rev. Rul. 72-178, 1972-1 C.B. 423.[5] By declaring Rev. Rul. 54-606 to be "obsolete,"

[4] The Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1230, relocated the definition of "firearm" from Section 5848(1), 26 U.S.C. (1964), to Section 5845(a) of the Internal Revenue Code. See S. Rep. No. 1501, *supra*, at 44.

[5] In *United States* v. *Drasen*, 845 F.2d at 736, the court of appeals concluded that, in enacting the Gun Control Act of 1968, Congress intended to incorporate this ruling as part of the "administrative construction of existing law." *Ibid.* See S. Rep. No. 1501, *supra*, at 46. The *Drasen* court concluded, moreover, that the "ruling did not amend the statute, but was in keeping with the common sense interpretation of the statute." 845 F.2d at 735.

It appears that none of the parties in *Drasen* were aware that Rev. Rul. 54-606, *supra*, had been declared obsolete in 1972. Indeed, respondent's counsel, who now tries to make much of this fact (Br. in Opp. 27-29), himself filed an amicus brief in *Drasen* without noting that the Ruling had been declared obsolete. See Gov't. Opp. to Mot. for Attorneys Fees in Ct. App. 8.

however, the Treasury did not revoke or repudiate the position set forth in the Ruling. To the contrary, as the agency noted, a ruling may become obsolete solely because "the subject matter of the ruling is now specifically covered by regulations." 1972-1 C.B. 423. With respect to Rev. Rul. 54-606, the statutory inclusion of parts kits for "machineguns" in the 1968 amendments to the National Firearms Act had been paralleled by even earlier regulatory rulings that had concluded that pistols with short barrels and "attachable" rifle stocks were subject to regulation as short-barrel rifles. See Rev. Rul. 61-45, 1961-1 C.B. 663; Rev. Rul. 61-203, 1961-2 C.B. 224. These rulings specifically determined that pistol "conversion kits" similar to the Contender system were regulated under the Act. These rulings have been uniformly applied by BATF and have remained in effect at all times since their initial promulgation in 1961. Respondent thus errs in contending (Br. in Opp. 28-29) that a complete kit for assembling a regulated short-barrel rifle from an unregulated pistol has not consistently been subject to regulation under the agency's rulings.

5. Respondent attempts to distinguish *United States* v. *Drasen* on the theory that *Drasen* "does not apply to the products at issue" (Br. in Opp. 24). Since *Drasen*, like the present case, involved a complete parts kit for the assembly of short-barrel rifles (845 F.2d at 732-736), it is unclear what respondent means. Moreover, in *Drasen*, as in the present case, the manufacturer's parts kit was one that "might or might not be assembled to form a short-barrel rifle" (845 F.2d at 732). See also Pet. 13 n.9.[6]

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[6] The district court in *Drasen* specifically noted that, under the government's theory of the statute, "a person who deals in [long-barrel rifle] parts [who] also happens to possess independently a single short-barrel part" would be subject to regulation under the National Firearms Act. 665 F. Supp. 598, 613 (N.D. Ill. 1987).

The only relevant difference between the two decisions is that in *Drasen* the court of appeals agreed with the numerous, prior decisions holding that a complete, but partially unassembled, regulated weapon constitutes a "firearm" under the Act. See Pet. 12-13. By contrast, in the decision below, the court of appeals disagreed with that conclusion and furthermore attempted to distinguish these prior decisions on the legally irrelevant basis that the Contender system is not a "gangster-type" weapon (Pet. App. 15a).

The conflict thus created among the courts of appeals by the decision in this case threatens to undermine basic enforcement of the Act. See Pet. 15-16. While respondent glibly forecasts that the decision below "will not cause the sky to fall" (Br. in Opp. 7), respondent offers no explanation of how, under the decision in this case, the National Firearms Act may be enforced against the street criminal or importer who maintains a regulated short-barrel rifle in a partially unassembled state. While other courts of appeals, as well as the Claims Court in this case (Pet. App. 28a-31a), have concluded that Congress intended to prohibit this facile circumvention of the Act, the decision in this case expressly allows that result.

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45051